

DECISION



Mr. Reagan
14245 PLMTT
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Protest Against Agency Determination That Proposal Was Nonresponsive]

FILE: B-193261

DATE: July 9, 1980

MATTER OF: Angstrom, Inc.

DIGEST:

Where protester in step one of two-step procurement does not respond timely to amendment having little impact on overall technical acceptability of proposal, but later states its compliance with amendment requirement when negotiations are reopened by subsequent amendment, agency's determination to exclude protester's step-two bid from consideration is unreasonable. Agency relied inappropriately on concept of responsiveness in determination which is inapposite to nature of step one--the qualification of as many proposals as possible under negotiation.

Angstrom, Inc. (Angstrom) protests the Department of the Army's (Army) decision that Angstrom's proposal under step one of a two-step procurement is nonresponsive because Angstrom failed to timely respond to an amendment effecting changes in the technical specifications.

We sustain Angstrom's protest.

On October 11, 1977, request for technical proposals (RFTP) No. DAAA22-78-B-0400, step one, was issued by the Army for a direct reading vacuum spectrometer to be used to analyze various materials used in the fabrication, processing and production of weapons to determine certain elements present and their concentrations. Several proposals were evaluated and the Army issued a step-two invitation for bids (IFB). Bids were received from Baird Corporation (Baird),

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Angstrom, Jarrell-Ash Division of Fisher Scientific Company (Jarrell-Ash), and one other party not involved in the present protest.

Baird filed a protest with our Office alleging that, with respect to Jarrell-Ash's technical proposal, the Army waived certain requirements of the RFTP. Baird also contended that Angstrom's technical proposal was nonresponsive since it proposed a spectrometer with 50 photomultiplier tubes and exit slits where, according to Baird's calculations, the expansion requirement in the RFTP would call for 59 phototubes.

We concluded that, because the Army intended to satisfy the Government's minimum needs by waiving certain requirements in the RFTP regarding an auxiliary readout device, step-one negotiations should be reopened. We also recommended that any uncertainties regarding the number of phototubes and slits to perform the basic analytical program as well as the number required to meet the Army's future expansion needs should be resolved by the Army during the reopened step-one negotiations. Baird Corporation, B-193261, June 19, 1979, 79-1 CPD 435.

Step one was reopened via amendment 0001 to the RFTP. The initial solicitation required in paragraph 3.2.2 that "the instrument shall have a capacity of not less than forty (40) exit slits and forty (40) photomultiplier tubes." Our decision had concluded that Angstrom's standard spectrometer complied with this requirement. Amendment 0001 deleted references to projected future expansion and required "a capacity of not less than fifty-five (55) exit slits and fifty-five (55) photomultiplier tubes."

Angstrom timely responded before the August 31, 1979, amended deadline with its notification of compliance. Baird acknowledged receipt of amendment 0001, but requested a clarification as to whether any of the 55 tubes not necessary to perform the basic analytical function needed to be supplied with the instrument. Jarrell-Ash acknowledged receipt of amendment 0001, but requested a clarification regarding the auxiliary readout device. The Army did not issue clarifications to these inquiries before the response date for the amendment. Rather, it issued amendment 0002 on August 31 which responded to the questions raised

by Baird and Jarrell-Ash. Regarding the number of tube/slit pairs, amendment 0002 required that the 15 tube/slit pairs not required to perform the basic analytical function be provided with the system, as follows:

"The instrument shall have a capacity of not less than fifty-five (55) exit slits and fifty-five (55) photomultiplier tubes. At least forty (40) of the slits and phototubes shall be used to perform the basic analytical program specified in 3.2.1 and will be appropriately mounted and aligned as specified. Those slits and phototubes not required to perform the basic program will be provided with the system along with any required mounting fixtures, electrical connectors and wiring required for installation. * * *"

The deadline for receipt of revised proposals in response to this amendment was September 14, 1979. Amendment 0002 stated that late proposals would be processed in accordance with the initial RFTP's late technical proposal clause.

Baird and Jarrell-Ash acknowledged amendment 0002 in a timely manner. Angstrom's compliance response dated September 7 was not mailed until September 10. The Army did not receive the response until September 17. Angstrom was notified by the Army that its late response would not be considered.

Technical evaluators determined that Angstrom's equipment met the technical requirements of the RFTP without considering the late response to amendment 0002. Amendment 0003 was issued and effected changes in the RFTP unrelated to the number of tube/slit pairs. All three offerors acknowledged amendment 0003 in a timely manner. Angstrom's response included a copy of its late response to amendment 0002. The three parties were invited to submit bids under step two and bid as follows: Angstrom \$144,209, Baird \$197,368 and Jarrell-Ash \$205,275. Angstrom's price was lower than its bid in the prior step-two IFB.

Baird filed a protest with the Army claiming Angstrom's proposal was nonresponsive to paragraph 3.2.2 because its standard vacuum spectrometer had a maximum capacity of only 50 phototubes and exit slits.

Spurred by Baird's protest the contracting officer had the technical evaluators again review Angstrom's proposal for technical acceptability. The reevaluation concluded that Angstrom's original proposal included 40 tube/slit pairs and complied with amendment 0001 in proposing an instrument with a 55-tube/slit pair capacity. But because the late response to amendment 0002 could not be considered, it could not be determined whether Angstrom would comply with the requirement of that amendment. The contracting officer concluded that amendment 0002 effected a significant change in the specifications requiring a timely statement of compliance by Angstrom for technical acceptability and, lacking such a statement "which was necessary for a determination of responsiveness," Angstrom's proposal should not have been considered for award under step two.

Although Angstrom contends that its late response to amendment 0002 should have been considered in determining whether Angstrom was eligible to proceed to step two of the procurement for various reasons, it is clear that the late proposal clause precluded any such consideration. A late response to an amendment, or to one of a series of amendments, will not be accepted as timely even though the negotiations have not been concluded. See Techniarts, B-189246, August 31, 1977, 77-2 CPD 167.

Angstrom contends that the statement of compliance with amendment 0002 sent with its response to amendment 0003 should have been considered in the step-one evaluations since the Army had the response before step-one negotiations ended on the closing date for amendment 0003 and before a determination of technical acceptability had been made.

Angstrom relies on the spirit and purpose of the two-step formal advertising procedures as stated in Baird Corporation, B-193261, supra:

"We have recognized that the two-step formal advertising procedure combines the benefits of competitive advertising with the flexibility of negotiation. See 50 Comp. Gen. 346 (1970). The first-step procedure

is similar to a negotiated procurement in that technical proposals are evaluated, discussions may be held and revised proposals may be submitted. * * *

The Army and Baird contend that Angstrom's late response to amendment 0002, included with the response to amendment 0003, cannot be considered under any circumstances; 52 Comp. Gen. 726 (1973) is cited for the proposition that late proposals under step one should be treated in strict accordance with the terms of the solicitation. It is further contended that, since amendment 0002 effected a substantial change in the RFTP requirements, Angstrom's failure to timely submit a statement of compliance rendered the entire proposal "nonresponsive" and, thus, Angstrom's proposal was erroneously included for step-two participation.

Our Office has held that the first step of two-step formal advertising, in furtherance of the goal of maximized competition, contemplates the qualification of as many technical proposals as possible under negotiation procedures whereby, through discussion and changes, a technical proposal is found to be acceptable. 50 Comp. Gen. 346 (1970). In this light, the reliance on 52 Comp. Gen. 726 is misplaced. The primary focus of that decision involved the late receipt of initial technical proposals. The negotiation process cannot cure this type of defect since an agency has no viable proposal on which to negotiate. Once a proposal has been timely submitted, the failure to timely acknowledge an amendment is another matter.

The real issue here is whether Angstrom's failure to acknowledge the amendment was a proper basis to exclude that firm from the competition and the ongoing negotiations during step one. As we indicated in Techniarts, supra, the late response to an amendment did not necessarily exclude an offeror from the competition. We held that, since the agency contemplated further negotiations with the other offerors, the agency should conduct further negotiations with the late responding offeror if, without considering the late response, the proposal was within the competitive range.

The Army and Baird rely on our decisions in Wapora, Inc., B-190045, February 1, 1978, 78-1 CPD 94, and La Barge, Inc., B-190051, January 5, 1978, 78-1 CPD 7, for the proposition that Angstrom's failure to timely respond to a substantive amendment to the RFTP, in accordance with the late proposal clause in the solicitation, is cause to reject the entire proposal.

In Wapora, the protester failed to respond to an amendment changing the terms and conditions of the contract. But unlike the present protest, this change was effected through a final amendment issued after the submission of best and final offers. No further negotiations were to be conducted after the closing date for this final amendment. In the present protest, further negotiations were in fact conducted via amendment 0003, thereby giving the offerors a chance to modify their proposals further.

In La Barge, a late response to an amendment adding a line item, a digital data converter, rendered the entire proposal late and unacceptable because no timely proposal had ever been submitted for the totality of the line items for which a single contract would be awarded. Because the amendment added a line item, the untimely response was regarded as an untimely submission of an initial proposal. While, as a general principle this holding is sound, the decision is modified to the extent it is inconsistent with what follows.

The qualifying nature of the two-step procedure requires that technical proposals comply with the basic or essential requirements of the specifications but does not require compliance with all details of the specifications. 53 Comp. Gen. 47 (1973); Baird Corporation, supra. Admittedly, the failure to acknowledge amendment 0002 resulted in a proposal deviating from the amended specifications, but the requirement of amendment 0002 that the 15 tube/slit pairs be furnished does not go to the very heart of the technical proposal. See Paragon Mechanical Company; Arnold M. Diamond, B-188816, November 23, 1977, 77-2 CPD 396. The requirement does not impose

on Angstrom's equipment anything new in the way of design or technical requirements, nor does it basically change the proposal as submitted. Rather, it merely clarified one part of a long list of detailed specifications for the item solicited, an initial proposal and amendment acknowledgment for which had been timely submitted by Angstrom. As Angstrom characterizes the net result of the amendment 0002 change, the Army "could receive a large bag of spare parts which may or may not be used at some point in the future."

Because the negotiations were reopened by the issuance of amendment 0003, to comport with the mandate for broadening competition during step one, Angstrom should have been allowed specifically to amend its initial proposal in order to cure the lack of amendment 0002 acknowledgment. We note that the Army notified Angstrom of its deficiency and that Angstrom did submit a statement that it would comply with the requirements of Amendment 0002, but this was ignored by the Army. Instead, the Army determined that Angstrom's proposal was unacceptable under Defense Acquisition Regulation (DAR) section 2-503.1(e) (1976 ed.).

In our opinion, the Army failed to recognize the negotiation nature of step one and has relied on inappropriate concepts of responsiveness in this case, which are inconsistent with the regulations as reflected in the RFTP, as amended. DAR § 2-503.1(e) provides, in part:

"(e) Technical evaluation of the proposals shall be based upon the criteria contained in the request for technical proposals * * *. The proposals, as submitted, shall be categorized as:

(i) acceptable;

(ii) reasonably susceptible of being made acceptable by additional information clarifying or supplementing, but not basically changing the proposal as submitted; or

(iii) in all other cases, unacceptable.

Any proposal which modifies, or fails to conform to the essential requirements or specifications of, the request for technical proposals shall be considered nonresponsive and categorized as unacceptable. If the contracting officer determines that there are sufficient proposals in category (i) above to assure adequate price competition under step two and that further time, effort and delay to make additional proposals acceptable and thereby increase competition would not be in the best interest of the Government, he may proceed directly with step two. Otherwise, the contracting officer shall request bidders under proposals in category (ii) above to submit additional information, setting forth to the extent practicable the nature of the deficiencies in the proposal as submitted or the nature of the additional information required. The contracting officer may also arrange discussions for this purpose. * * *" (Emphasis added.)

The regulation clearly indicates that discussion making proposals acceptable is not precluded by the existence of other already acceptable proposals. Also, in order to proceed to step two without further negotiation, the contracting officer must determine that it would not be worthwhile to attempt to make a deficient proposal acceptable. In addition, the RFTP and regulations (DAR § 2-503.1(a) (vii)) provide that step two bids will be solicited on technical proposals determined to be acceptable, "either initially or as a result of discussion."

This Office has held that an agency should make reasonable efforts to bring step one proposals to acceptable status. Mainline Carpet Specialists, Inc., B-192534, May 8, 1979, 79-1 CPD 315; Coastal Mobile and Modular Corporation, B-183664, July 15, 1975, 75-2 CPD 39. We recognize that an agency has great discretion in classifying a proposal as technically unacceptable, and this Office will not overturn such a decision unless clearly unreasonable. METIS Corporation, 54 Comp. Gen. 612 (1975), 75-1 CPD 44. However, we are constrained

to find that the Army's classification of Angstrom's proposal as unacceptable because of nonresponsiveness, and thus not for step-two consideration, was clearly unreasonable.

Keeping in mind that step one is similar to negotiation, it is fundamental that the rigid rules of bid responsiveness do not apply. TM Systems, Inc., 56 Comp. Gen. 300 (1977), 77-1 CPD 61. "Responsiveness" is ordinarily considered to be a subject for negotiation, DPF Inc., B-180292, June 5, 1974, 74-1 CPD 303, rather than a conclusion precluding negotiation. In this vein, we see no difference between a timely nonresponsive initial proposal and a proposal nonresponsive due to failure to acknowledge an amendment. We view the regulation reference to responsiveness to clearly refer to technically unacceptable proposals. As mentioned above, the real issue is whether a proposal should be included in the competitive range or competition. Self-Powered Lighting, Ltd., B-195935, March 13, 1980, 59 Comp. Gen. ___, 80-1 CPD 195.

In cases involving regular negotiated procurements and the similar first step of a two-step procurement, we have held that major proposal defects or failure to comply with a material requirement which could easily be cured through discussion or which do not call for extensive revision do not preclude further participation in the competition. See Self-Powered Lighting, Ltd., *supra*; Guardian Electric Manufacturing Company, 58 Comp. Gen. 119 (1978), 78-2 CPD 376. Recently, we questioned the wisdom of not conducting discussions with an offeror which submitted a competitive initial proposal but failed to acknowledge a material amendment. Galaxy Aircraft Company, Inc., B-194356, May 28, 1980, 80-1 CPD 364.

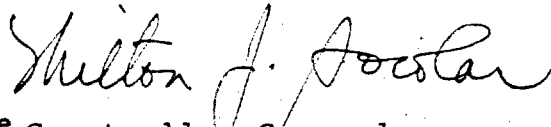
The Army's sole basis for excluding Angstrom from step two was the protester's failure to state that the 15 tube/slit pairs for future expansion would be provided with the system. We hold that this defect had little impact on the overall technical acceptability of the proposal and could easily have been cured through negotiation. The Army, relying on the inapposite concept of responsiveness, has made no affirmative showing that attempts to cure the deficiency would not have been in the best interests of the Government. See DAR § 2-503.1. Rather, we hold that the Army's failure to conduct negotiations affirmatively in this case was not in the Government's

best interest. The effort and delay to have made Angstrom's proposal acceptable would have been negligible at most. Indeed, the Army implicitly recognizes this. All it required in response to amendment 0002 was the simple phrase "Para. 3.2.2.--We comply." Additionally, the equipment was not urgently needed since no award has yet been made in this several-year-old procurement, and qualifying Angstrom's proposal would have increased the number of competitors.

Since Angstrom on its own initiative accomplished what the agency should have by eventually acknowledging amendment 0002 and did submit a bid before its exclusion from step two, we recommend that the Army award the contract to Angstrom.

By letter of today, we are advising the Secretary of the Army of our recommendation.

The protest is sustained.



For the Comptroller General
of the United States